No. 21149

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN CEMENT CORPORATION,

Appellant,

vs.

HEALY TIBBITTS CONSTRUCTION COMPANY,

Appellee.

Upon Appeal from the United States District Court, Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Appellee's brief is not a satisfactory answer to appellant's opening brief. Appellee attempts to rationalize with illogical explanations some of Healy Tibbitts' acts and the written record and completely ignores other undisputed evidence compelling the conclusion that Healy Tibbitts by contractual undertaking had the risk of damage to Barge No. 41 when the accident occurred. The untenable position in which appellee finds itself is set forth below.

HEALY TIBBITTS' REPORT OF THE ACCIDENT TO ITS UNDERWRITERS

The inescapable fact is that Healy Tibbitts, having obtained hull insurance on Barge No. 41 which provided the well-known perils of the sea or act of God type of coverage,[1] reported the accident to its broker or insurance company and requested their help.[2] Further, the accident occurred during the period that the written record of Healy Tibbitts' insurance broker states that Healy Tibbitts had the risk of Barge No. 41.[3] The specified period of risk coincides with the times Tug GARVIN picked up and returned Barge No. 41 to its berth at Long Beach or the period Healy Tibbitts had Barge No. 41 under charter.

Since the accident occurred while the Barge was under tow by Tug GARVIN en route to Healy Tibbitts' job site[4] and Healy Tibbitts' personnel had not been near Barge No. 41, there was no conceivable way in which Healy Tibbitts could be involved unless Healy Tibbitts had agreed to assume throughout the charter period the risk of damage to the Barge. Healy Tibbitts' actions following the accident can be explained only on the basis that Healy Tibbitts knew it had agreed or committed itself to American to assume the risk of damage to the Barge. Businessmen simply do not make reports and ask their insurance company for help unless the company is potentially involved. In this instance, the only possible involvement of Healy Tibbitts and its insurance company

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[1] R.Tr. 96-100, 119, Exh. 16.

[2] R.Tr. 103-4.

[3] Exh. 16.

[4] Finding No. 8.

was on the basis that Healy Tibbitts had previously agreed and, in fact, had the risk of damage to the Barge when the accident occurred.

HEALY TIBBITTS' INSURANCE BROKER'S REPORT TO ITS UNDERWRITERS

While appellee's brief attempts at length to rationalize Healy Tibbitts obtaining insurance on Barge No. 41 and states the insurance was for a period "since it was unknown just when and how long the Barge would be at the job site and there was no difference in the insurance premium",[5] appellee ignores the fact that Healy Tibbitts' insurance broker or representative Marsh, McLennan-Cosgrove & Co. by letter of April 1, 1964 (the accident occurred the morning of January 7, 1964) advised Healy Tibbitts' underwriters that the underwriters earned $100.00 premium for Barge No. 41 being at the risk of Healy Tibbitts for the period January 6, 1964 - 0200 to January 8, 1964 - 0830.[6] Obviously, Marsh, McLennan had to be given the foregoing information by Healy Tibbitts. It is apparent that Healy Tibbitts told Marsh, McLennan that it had the risk not only at the job site but from the beginning to the end of the charter period. Certainly Healy Tibbitts would know exactly when Barge No. 41 was at the job site and if its assumption of risk was limited to the job site, it would not have given Marsh, McLennan the times Tug GARVIN picked up and returned the Barge to Long Beach as the period of risk.

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[5] Appellee's Reply Brief, Page 15.

[6] Exh. 16.

In this particular instance the accident occurred before the Barge even reached the job site and Tug GARVIN returned the Barge to Long Beach as soon as it had the situation under control. Consequently, if Healy Tibbitts did not have the risk until the Barge was at the job site as Healy Tibbitts now asserts, Healy Tibbitts would not have advised its insurance broker that it had the risk of Barge No. 41 for the full charter period and certainly would not have committed itself to pay a $100.00 premium for a risk which never attached. Businessmen simply do not report to their underwriters risks that do not exist or voluntarily commit their company to pay $100.00 premiums for nothing.

THE SURVEY AND INVITATION TO BID

If Healy Tibbitts was not involved in the Barge accident by virtue of a contractual undertaking to assume the risk at the time of the accident, there is no rational explanation for the actions of Healy Tibbitts' underwriters following up on the report of accident by Healy Tibbitts. Contrary to appellee, it is not common practice for underwriters to arrange for a survey and prepare specifications for repairs to property unless they have some potential interest in the property. And certainly underwriters do not solicit bids be sent to their assured unless their assured has some obligation to repair the damages sustained. Yet, appellee argues that Healy Tibbitts' underwriters surveyed and invited bids without any conceivable interest in Barge No. 41.[7] American, of course, attended the survey and reviewed the specifications prepared by Healy Tibbitts'

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[7] Appellee's Reply Brief, Pages 15-16.

representatives because, as owner, American had an interest in the repairs which would be made. On the other hand, Healy Tibbitts and its underwriters could have no conceivable interest in surveying or repairing Barge No. 41 unless by contract Healy Tibbitts had assumed the risk of damage when the accident occurred.

THE WRITTEN RECORD

There were six documents admitted into evidence which could be considered as relating to the issue of Healy Tibbitts' assumption of risk, namely:

(1) The purchase order dated January 6, 1964;[8]

(2) The January 6, 1964 purchase order as modified by Mr. Smith following the accident;[9]

(3) The United States Salvage Association report;[10]

(4) Bids submitted for repairing the Barge;[11]

(5) Long Beach Marine Repair Company invoice for barge repairs;[12] and

(6) Healy Tibbitts' insurance broker's letter of April 1, 1964.[13]

All the documents, with the exception of the Long Beach Marine invoice, were prepared by Healy Tibbitts

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[8] Exh. 2.

[9] Exh. 14.

[10] Exh. 10.

[11] Exh. 15.

[12] Exh. 5.

[13] Exh. 16.

or in behalf of Healy Tibbitts by its agents or representatives, or in the case of the bids, were prepared by third parties at the request of Healy Tibbitts' underwriters' representative, United States Salvage Association.

As discussed above, the United States Salvage Association report, the solicitation and tender of bids and Healy Tibbitts' insurance broker's April 1, 1964 letter are logical and consistent only with Healy Tibbitts having the risk of damage to the Barge when the accident occurred. The Long Beach Marine invoice was addressed to American because after soliciting bids and ascertaining the cost of repairs, Healy Tibbitts refused to proceed and American was obliged to instruct Long Beach Marine to make the repairs in order that American could return its barge to use.

The purchase order of January 6, 1964, patently is a mere confirmation of sale prices intended for accounting or billing purposes. Appellee argues that the purchase order is the complete agreement for chartering Barge No. 41.[14] In fact, the purchase order bears no resemblance whatsoever to a charter party which would be signed by both parties and would contain at the minimum the time when the charter commenced and terminated, where the Barge was to be delivered to charterer and redelivered to owner and also usually would contain provisions as to the condition in which the barge was to be delivered and returned, a prohibition against liens, charterer's promise to indemnify owner against liability, claims, penalties or fines in connection with the operation of the barge by charterer unless

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[14] Appellee's Reply Brief, Page 5.

caused by the negligence of owner, detailed provisions as to insurance coverage and who was to obtain the insurance and pay the premiums, a limitation as to the use to which the barge could be placed by charterer, a prohibition against assignment or subchartering, and perhahaps a reference to applicable law and to arbitration.

It is obvious that the purchase order does not come close to a complete agreement or charter party and it is specious for appellee to assert that the purchase order was the entire agreement. The fact that Mr. Smith would testify that the purchase order constituted the entire agreement[15] raises a serious doubt as to whether, at the time of trial, Mr. Smith recalled the details of the transaction or the negotiations and the agreement he reached with Mr. Dunn. Certainly, if a charter agreement had been prepared embodying customary provisions but neglecting to specify the condition in which the barge was to be returned to owner, the absence of such provision would carry considerable weight as appellee argues, but not in this situation. Further, the change in the purchase order following the accident by Mr. Smith does imply an admission that Healy Tibbitts had the risk when the accident occurred. Appellee has attempted to rationalize the change on the basis that it avoided an argument[16] but such explanation is wanting in substance and particularly so in view of the fact that Mr. Smith testified that Healy Tibbitts' responsibility for the barge commenced as soon as the F.O.B. transaction occurred[17] and Healy Tibbitts' original purchase order

[15] R.Tr. 84-6.

[16] Appellee's Reply Brief, Page 17.

[17] R.Tr. 87-8.

which was in effect when the accident occurred, clearly provides for a F.O.B. Catalina transaction[18] which, in fact, occurred well before the accident happened.

Therefore, there is a series of four documents,[19] none of which were prepared by American, which are consistent with Healy Tibbitts having the risk when the accident occurred, and no implication one way or the other may be drawn from the original purchase order[20] or the Long Beach Marine invoice for barge repairs.[21]

THE LAW

Appellee cites *Mulvaney vs. King Paint Manufacturing Company,* 256 Fed. 612 (2nd Cir. 1919) and other cases[22] for the proposition that even if Healy Tibbitts had promised to return the barge in the same good order and condition as when received, Healy Tibbitts would still only be liable for negligence. More recent cases have brought the meaning of the phrase "return in the same good order and condition as when received" in line with the plain meaning of the words and have required that the charterer do precisely what the words say.

> *Ross vs. Moran Towing & Transportation Co.,* 55 F.2d 1052 (2nd Cir. 1952); cert. den. 287 U.S. 608;

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[18] Exh. 2.

[19] Exhs. 10, 14, 15 and 16.

[20] Exh. 2.

[21] Exh. 5.

[22] Appellee's Reply Brief, Page 18.

Metropolitan Sand & Gravel Corp. vs. The Dwyer No. 25, 130 F. Supp. 172 (S.D.N.Y. 1954);

Baldwin vs. New York Cent. R. Co., 87 F. Supp. 562 (E.D.N.Y. 1949);

The Zeller No. 14, 74 F. Supp. 538 (E.D.N.Y. 1947).

Moreover, the discussions between Mr. Dunn and Mr. Smith clearly contemplated that Healy Tibbitts would assume the risk of damage to the barge or have an insurer's position[23] and the written record, namely the April 1, 1964 letter of Healy Tibbitts' insurance broker, confirms that Healy Tibbitts had such risk throughout the term of the charter.[24]

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[23] R.Tr. 20-1, 92-101.

[24] Exh. 16.

CONCLUSION

On an objective analysis of the evidence, both documentary and oral, the inevitable conclusion is that Healy Tibbitts had agreed to assume the risk of damage to Barge No. 41 when the accident occurred. Undisputed facts and the written record render the credibility of Mr. Smith's oral denial of responsibility extremely doubtful especially in view of his admission that Healy Tibbitts assumed the responsibility as soon as the F.O.B. transaction occurred which, in fact, took place at Catalina before the accident. The findings should be modified to provide that Healy Tibbitts did assume the risk of damage to the barge and to the findings, conclusions and decree there should be added provisions entitling American to recover from Healy Tibbitts $8,404.00 with interest at the rate of 6% from and after January 31, 1964.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAWRENCE D. BRADLEY, JR.